92-782

No.

Supreme Court, U.S.
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IN THE

UNITED STATES SUPREME COURT

October Term, 1992

JOANNE M. WESTON,

Petitioner,

vs.

ROBERT R. AND FEROL M. RODRIGUEZ;

AND

FRANKLIN S. CIBULA, A Law Corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Petitioner in pro per

QUESTIONS PRESENTED

The primary questions presented in this petition for certiorari are:

1. Whether the published opinion of the Honorable David E. Russell, U.S. Bankruptcy Judge, Eastern District of California, in which he refused to apply the "plain meaning" rule of statutory interpretation and basically "rewrote" the Code to reflect what he felt it should have said, was correct.

2. Whether the subsequent published opinion of the District Court, which ignored the previous decision of the Ninth Circuit Bankruptcy Appellate Panel in the same case and arrived at a different conclusion, was correct.

3. Whether the Ninth Circuit Court of Appeals erred by affirming, in a single-page decision, both of the above opinions, when the later District Court opinion was in direct conflict with the earlier one.

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PETITION FOR A WRIT OF CERTIORARI
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Petitioner, JoAnne M. Weston, acting in pro per, respectfully requests that a writ of certiorari issue to review the decision of the Ninth Circuit Court of Appeals, entered in the consolidated cases, Nos. 90-16501 and 91-15360.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is not reported, having been classed as "not suitable for publication." It is reproduced in the Appendix at A-1, 2.

The Ninth Circuit Bankruptcy Appellate Panel's ("BAP") decision in BAP No. EC-89-1604-MeAsJ (C.A. Case No. 91-15360) was also classed as "NOT FOR PUBLICATION", and is reproduced in the Appendix at A-70 through A-72.

The underlying subject order of the above BAP appeal, by the Honorable David E. Russell, Bankruptcy Judge, was reported in Weston v. Cibula, 101 B.R. 202 (Bankr. E.D. Cal. 1989) and is reproduced in the Appendix at A-9 through A-23.

The subject order of the appeal, C.A. Case No. 90-16501, was the opinion of the U.S. District Court, Eastern District of California, reported in Weston v. Rodriquez, 110 B.R. 452 (E.D. Cal. 1989), and affirmed the default judgment of Judge Russell which granted the motion of the Respondents Rodriguez seeking the court's approval of a rescinded settlement agreement. It is reproduced at A-24 through 54.

The subsequent order of the District Court in the case, on granted rehearing, was not reported, and is reproduced at A-55 - 69.

The earlier, related decision by the BAP in the appeal of the order dismissing Petitioner's first case, BAP No. EC-86-1214, was also classed "NOT FOR PUBLICATION", and is reproduced at A-6 - 8. None of the other orders reproduced in the Appendix have been reported, including the orders of the BAP and the Court of Appeals which denied rehearing, which two orders are reproduced at A-73 and A-74, respectively.

JURISDICTION

The decision of the Ninth Circuit Court of Appeals was entered on July 2, 1992. (App. A-1) A timely petition for rehearing was denied on September 1, 1992, and the Petitioner's motion for stay was first granted on September 17, with an extension granted on October 19, 1992. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved in this case include several Rules of Federal Bankruptcy Procedure ("FRBP"), as well as certain ones of the Federal Rules of Civil Procedure. The case also involves certain well established principles of law re jurisdictional issues and the "law of the case" doctrine, as well as the "plain meaning" rule of statutory interpretation.

FRBP 1017(d) is the controlling Code statute for all proceedings to dismiss or convert a bankruptcy case. The pertinent text is contained in the Appendix at A-16.

FRBP 9014 is the statute which governs all "contested matters", and also makes certain adversary rules applicable to such matters. The relevant text of Rule 9014 is contained in the Appendix at A-17.

FRBP 7062 incorporates Rule 62, Federal Rules of Civil Procedure. The text of the two statutes can be found at A-12 and A-36.

FRBP 9019 governs compromise and settlement of controversy in bankruptcy cases, and its text can be found at A-75.

FRBP 7055 incorporates F.R.Civ.P 55 and governs default judgments in both adversary and contested matters. The relevant text of Rule 55 is at A-75.

FRBP 8002(b) governs the effect of a timely motion to reconsider an order in bankruptcy cases on the notice of appeal re the order. The relevant text can be found at A-75.

STATEMENT OF CASE

Petitioner first filed for bankruptcy protection under a Chapter 11 on March 15, 1985, primarily caused by the misconduct of her former attorney, Franklin S. Cibula, who had conspired with certain adverse parties against the Petitioner's interests. Petition had been embroiled in litigation over a certain real estate project, and had heavily encumbered her own property

to finance the project. When Petitioner discovered Respondent Cibula's betrayal, she discharged him as her attorney. At the time of the Chapter 11 petition, the Respondent Cibula had filed a complaint in state court against Petitioner, seeking his claimed "legal fees", and certain of the above adverse parties, Respondents Rodriguez, were attempting to foreclose upon the two parcels of Petitioner's real property referred to above. Also pending at the time of the petition filing was a civil complaint against Respondents Rodriguez, which had been brought by Petitioner and charged Respondents with usury, breach of contract and wrongful foreclosure. All of these actions were stayed by the filing of the Chapter 11 petition.

Both Cibula and Rodriguez were listed as disputed creditors in the case, and on December 5, 1985, the bankruptcy court

denied Respondent Rodriguez relief from the automatic stay, with the order being entered on December 17. (App. A-3) On December 22, 1985, Rodriguez rescheduled the foreclosure sales of Petitioner's two properties, setting them for February 24, 1986. No notice of the rescheduled date was provided to Petitioner, nor was it published in any county newspaper.

At the December 2, 1985 hearing on the motion for relief, a sua sponte order to show cause why the bankruptcy case should not be dismissed was also heard. The order alleged that no plan had been proposed and was at the request of the estate administrator. As the Petitioner had filed both a disclosure statement and a proposed plan, which had the approval of the unsecured creditors on file, Petitioner's counsel requested that the order to show cause be dismissed and the case allowed to proceed with the disclosure statement hearing.

On January 14, 1986, a sua sponte order dismissing the Chapter 11 case was entered, with copies of the order sent out on that date, which did not show any date of entry. On January 15, Cibula applied for, and was granted, a default judgment in his action against Petitioner for his fees. Cibula promptly utilized the default judgment to record liens against various properties of the Petitioner. On January 17, believing the dismissal order to be a clerical error, Petitioner's counsel served all interested parties with a motion for reconsideration of the dismissal, which was heard and taken under submission on February 19, 1986.

On February 24, Rodriguez proceeded with the rescheduled foreclosure sales, and obtained both parcels of Petitioner's property by a "credit bid" on each. As no one but Rodriguez and the parties involved with conducting the sale were aware of it, there were no other "bidders" present.

On February 27, 1986, the order denying the motion for reconsideration was entered, and Petitioner's timely appeal to the Ninth Circuit Bankruptcy Panel, BAP No. EC-86-1214, was filed on March 5, 1986. The bankruptcy court had jurisdiction over the case pursuant to 28 U.S.C. § 157(b), while the BAP's jurisdiction is derived from 28 U.S.C. § 158(b).

While the appeal was pending, a second Chapter 11 case was filed by Petitioner on October 24, 1986. On February 26, 1987, the BAP issued a conditional order of dismissal in the appeal, EC-86-1214, based on the fact that, if valid, the foreclosure sales by Rodriguez had "mooted" the appeal and called for its dismissal. (App. A-4) Upon learning of the facts surrounding the sales, as detailed above, the BAP WITHDREW the conditional dismissal order. (App. A-5).

Despite the foregoing facts, the Honorable David E. Russell, Bankruptcy Judge,

issued various lift-stay orders in the second case, based upon his conclusion that the sales had occurred while "no bankruptcy case was pending", and therefore that were valid. Petitioner also applealed those orders, and, as was to be the case throughout, all motions for stay pending appeal were denied. Faced with an impending unlawful detainer action by Rodriguez due to Judge Russell's lift-stay order, and the denial by both the BAP and the lower court of her stay pending appeal motions, Petitioner feared that the appeals could all be "mooted", including the first one, BAP No. EC-86-1214. On January 12, 1988, she reluctantly entered into a settlement with Respondents Rodriguez. (App. A-26, 27) The settlement agreement, however, was contingent upon its having no adverse impact upon the appeal, EC-86-1214, and when Petitioner discovered that the agreement would "moot" the appeal, she rescinded

the settlement, serving and filing a "Notice of Rescission". Respondents then brought a motion before the bankruptcy court, seeking its approval for the rescinded settlement, to which Petitioner filed vigorous opposition. Despite the un-filed opposition, Judge Russell granted, by default, the motion for approval, which was entered April 5, 1988. On April 8, in direct violation of the ten-day stay of FRBP 7062, Respondents Rodriguez recorded the settlement documents. Petitioner filed a timely motion pursuant to 9023, seeking to have the default judgment approving the rescinded settlement vacated, which was heard an submitted on May 17, 1988.

On May 20, 1988, the BAP filed its decision in the appeal, EC-86-1214, and it VACATED the dismissal order for not being authorized under the Bankruptcy Code and remanded the reinstated Chapter 11 case to the bankruptcy court. (App. A-6 - A-8)

In an attempt to preserve the status-quo, Petitioner had recorded a lis pendens on the property Respondents Rodriguez were attempting to gain with the rescinded settlement agreement, and on one day's notice, counsel for the Respondents obtained an order from Judge Russell expunging the recorded notice on June 8, 1988. As the motion to vacate the approval was still undecided, and Petitioner had sent a copy of the BAP decision to Judge Russell, a motion to vacate the expungement order was filed by Petitioner, and a second lis pendens was recorded. On June 15, Judge Russell denied the Petitioner's motion to vacate the approval order, and Petitioner timely appealed on June 22, 1988, which was thereafter transferred to the District Court. The jurisdiction of the District Court over bankruptcy appeals is derived from 28 U.S.C. § 158(a).

On Appeal, the District Court ignored

Petitioner's arguments on appeal, and instead, concluded that the foreclosure sales were valid, thereby mooting the real property issues of the appeal. Since the court could not "grant appellant effective relief" (App. A-43), and it was reasonable, under the circumstances, for the bankruptcy court to approve the settlement.

This decision, entered December 13, 1989, was reported as Weston v. Rodriguez, 110 B.R. 452 (E.D. Cal. 1989). Petitioner timely moved for rehearing, which was then granted, and the second order in the case was entered on August 28, 1989. In her motion, Petitioner had pointed out, inter alia, that the prior BAP decision in the appeal EC-86-1214, had VACATED the dismissal order and implicitly determined that the foreclosure sales were not valid in withdrawing the order dismissing the appeal. While acknowledging the arguments raised by Petitioner, which included the argument

that under the "law of the case" doctrine, the prior BAP determination re the foreclosure sales was binding on the bankruptcy court, the District Court still disregarded those arguments and once again affirmed the approval of the settlement by the bankruptcy court. The only aspect of this second order that Petitioner agreed with was the specific ruling that the ten-day stay of FRBP 7062 applied to case dismissal orders, and the matter was timely appealed to the Ninth Circuit Court of Appeals, whose jurisdiction is found under 28 U.S.C. § 158(d).

In the meantime, following the BAP decision in EC-86-1214, Petitioner brought an action against her former attorney, Respondent Cibula, seeking to have the default judgment he had obtained on January 15, 1988, set aside for having been in violation of the ten-day stay of FRBP 7062. Judge Russell refused to set aside the default judgment, writing a rather involved

opinion wherein he determined that despite the fact that under FRBP 1017(d), case dismissals were "contested matters", and that pursuant to FRBP 9014, which governed all such matters, FRBP 7062, along with other adversary rules, was made applicable to contested matters, the ten-day stay of FRBP 7062 did not apply to case dismissal orders because he didn't think Congress intended such a result. Weston v. Cibula, 101 B.R. 202 (Bankr. E.D. Cal. 1989). (App. A-9 - A-23)

On appeal to the BAP, No. EC-89-1604, the primary issue of the appeal was misidentified by the BAP Panel as being the other question of whether or not the automatic stay of § 362(a) remains in effect during the time following a case dismissal and its later reversal on appeal. (App. A-70 through A-72). Stating that the District Court had already decided the issue, the BAP upheld the Weston v. Cibula decision,

citing the Weston v. Rodriguez case. The Petitioner quickly moved for rehearing, and pointed out the error to the BAP, as well as including a copy of the second order of the District Court, which specifically ruled that FRBP 7062 did apply to case dismissal orders, thereby establishing that the District Court case was in direct conflict with the earlier opinion by Judge Russell, which was the subject order of the appeal. The BAP denied the motion for rehearing without comment, and the petitioner appealed to the Ninth Circuit Court of appeals once more. (App. A-73)

The two cases, No. 90-16501 (Weston v. Rodriguez), and No. 91-15360 (Weston v. Cibula), were consolidated by the Court of Appeals, and, along with a related case, No. 91-15722, were submitted on the briefs to the same Circuit Panel on December 13, 1991. Since the later case actually consisted of three BAP appeals, and was as a

direct result of the earlier appeals, as well as being far more complex, Petitioner fully expected that the cases would be determined in order of filing. Instead, the last case was the first one to be determined, with no regard to the earlier cases. The denial of rehearing in that matter forced Petitioner to file the related petition for certiorari, No. 92-416.

On July 2, 1992, six months after the decision in Case No. 91-15722, and four months after rehearing in that case had been denied, the Circuit Panel filed its decision in the earlier two appeals, Cases Nos. 90-16501 and 91-15360. In an echo of the erroneous BAP decision (appealed ib No. 91-15360), the Circuit Panel, in a one-page decision, affirmed both the published opinions; Weston v. Cibula, supra, and Weston v. Rodriguez, supra. (App. A-1, 2). The Petitioner timely applied for rehearing, and, as she had done before the BAP, cited

that fact that the two cases were in conflict, and both could not be affirmed, as a matter of law. The rehearing was denied without comment. (App. A-74) However, Petitioner's motion for a stay pending certiorari was granted, and the mandate is stayed through November 3, 1992.

REASONS FOR GRANTING PETITION

I. BANKRUPTCY COURT'S PUBLISHED OPINION CONFLICTS WITH CLEAR DIRECTIVES FOR STATUTORY INTERPRETATION THAT HAVE BEEN ESTABLISHED BY THIS COURT.

The published opinion of Judge Russell ignores the clear directives of this Court for statutory interpretation. Those well established directives state that the "plain meaning" rule must be applied, absent drafting error or an absurd result. United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989) (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)). In Davis v. Michigan Dept. of Treasury, 489 U.S. 803 (1989), the Court stated that "[l]egislative history is

irrelevant to the interpretation of an unambiguous statute." Other decisions of this Court also attest to the omnipresence of the "plain meaning" rule. See, e.g., Board of Education of the Westside Community Schools v. Mergens, _U.S._,_, 110 S.Ct. 2356, 2365 (1990); K-Mart Corp. v. Cartier, Inc., 486 U.S. 281, 299 (1988); Blum v. Stenson, 465 U.S. 886, 896 (1984); TVA v. Hill, 437 U.S. 153 (1978).

See also, Mansell v. Mansell, 490 U.S. 581 (1989) (where the language of the statute is plain and precise, it is conclusive of the statute's meaning, absent "clear evidence that reading the languge literally would thwart the obvious purpose of the Act"); accord, Burlington N.R.Co. v. Okla.Tax Comm'n, 481 U.S. 454, 461 (1987); Heckler v. Turner, 470 U.S. 184, 212 (1985) (courts do not sit to second-guess the course Congress has set and the wisdom of their choices); Garcia v. United States,

469 U.S. 70, 75 (1984) (where the language of the statute is clear, only the most extraordinary showing of contrary intentions justify altering the plain meaning of a statute); Badaracco v. Commissioner, 464 U.S. 386, 398 (1984); ("courts are not authorized to rewrite a statute simply because they might deem its effects susceptible of improvement"); Central trust Co. v. Official creditors' Comm. of Geiger Enters., 454 U.S. 354, 359-60 (1982) (where the statute's language is plain, "the sole function of the court is to enforce it according to its terms" [quoting Caminetti v. United States, 242 U.S. 470, 485 (1917)]; Rubin v. United States, 449 U.S. 424, 430 (1981) (when the terms of a statute are unambiguous, judicial inquiry is complete); Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) (if the language of the statute is clear and unambiguous, that language must ordinarily

be regarded as conclusive); Crooks v. Harrelson, 282 U.S. 55, 60 (1930) (the remedy for laws thought to be absurd lies with the law-making authority, and not with the courts); Toibb v. Radloff, __U.S. __, 111 S.Ct. 2197 (1991) (when an issue to be decided "turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear", [quoting Blum v. Stenson, supra]) (emphasis added). All of the above cited cases were provided to the Ninth Circuit Court of Appeals in the case No. 91-15360.

The "plain meaning" rule was once again applied by this Court in Patterson v. Shumate, __U.S. __, 112 S.Ct. 2242 (1992), with Justice Scalia applauding the "natural reading" of the statute in his concurring opinion.

In addition, Petitioner had argued before the Court of Appeals that if case

dismissal orders were intended to be excepted from the ten-day stay provisions of FRBP 7062, Congress would have included such orders among the other bankruptcy case orders that Congress had listed as being additional exceptions to the ten-day stay provisions of Rule 62(a). In support of this argument, Petitioner had cited this Court's decision in Johnson v. Home State Bank, __U.S. __, 111 S.Ct. 2150 (1991), wherein the Court held that when Congress expressly prohibited certain serial filings, a form of serial filing not so prohibited was therefore allowable under the Bankruptcy Code. This Court based its ruling on the "absence of a like prohibition on [such] serial filings ... combined with the evident care with which Congress fashioned the express prohibitions ...." In support the Court cited United States v. Smith, 499 U.S.___, ___, 111 S.Ct. 1180, __,(1991) (expressly enumerated exceptions

presumed to be exclusive). Id, at 2156. It also should be noted that the Federal Rules of Bankruptcy Procedure have been amended since case dismissal orders were specifically designated Contested matters. FRBP 7062 was last amended in 1991 with more additions added to the exceptions to the ten-day stay list; case dismissal orders were not among the additional exceptions this time either.

Clearly, the published opinion of the Honorable David E. Russell in Weston v. Cibula, supra, conflicts with this Court's directives for statutory interpretation, and should not have been affirmed by the Ninth Circuit Court of Appeals.

II. DISTRICT COURT'S OPINION IGNORED WELL ESTABLISHED PRINCIPLES OF LAW AND SETS AN ERRONEOUS PRECEDENT, ON A QUESTION OF FIRST IMPRESSION

In her appeal of the default judgment approving the rescinded settlement with Respondents Rodriguez, the Petitioner

argued that the approval order was improper for several reasons, including 10 the mo= tion for approval was not in compliance with the requirements of the controlling FRBP 9019, which states that it is the trustee who must bring the motion; 2) the settlement had been rescinded because it would have mooted the appeal, BAP No. EC-86-1214, and the agreement was contingent upon its having no adverse impact upon the appeal; 3) granting the improper motion by entered default violated the strict provisions of FRBP 7055, made applicable to the proceedings by FRBP 9014; and 4) the bankruptcy court had refused to accept the full implication of the BAP decision in the appeal EC-86-1214 when the lower court considered Petitioner's motion to VACATE the dismissal order.

In its decision of the appeal involving the default approval of the rescinded settlement agreement, the District Court

also ignored the prior BAP decision and the "law of the case" doctrine. As was argued by the Petitioner, the BAP had, in the process of determining the appeal, considered the validity of the foreclosure sales and the fact that they would moot the appeal and cause its dismissal. The validity of the sales had been implicitly rejected by the BAP, and the decision was not appealed. In addition, the BAP had VACATED the dismissal order as not being authorized under the Code. Although it acknowledged that the dismissal had been "reversed" by the BAP, the District Court concluded that the foreclosure sales had not violated the automatic stay, and thus were valid, thereby mooting the real property issues of the appeal. Therefore, the District Court concluded it could not grant the Petitioner "effective relief", and under the circumstances, it was reasonable for the bankruptcy court to grant

the Respondents' motion for approval of the settlement agreement.

On rehearing, the District Court again acknowledged the issues that the Petitioner had raised, but still failed to address them; instead stating that because the Petitioner had not sought a stay pending her motion to reconsider the dismissal of her case, the only stay that had been in effect was the ten-day stay of FRBP 7062, which had run prior to the foreclosures. The Petitioner had argued that although a case could certainly be made for the argument that the automatic stay had never lapsed because the dismissal order was VOID for having failed to meet statutory requirements, (which was why the BAP had VACATE it on appeal), the question she qas raising was the effect the timely motion for reconsideration had had on the effectiveness of the dismissal order. In addition, Respondents Rodriguez had requested relief from

the automatic stay, which was denied prior to the December 22, 1985 rescheduling of the foreclosure sales. (App. A-3) Those sales took place prior to the disposition of the motion to reconsider, and prior to the time anyone could file an appeal of the dismissal order. See FRBAP 8002(b); In re Sweet Transfer & Storage, Inc., 896 F.2d 1189 (9th Cir. 1990). Petitioner contended that because the motion was a proper one, the case was still viable, and the automatic stay was thus still in effect, as to property of the estate.

The District Court cited only two cases as support for its conclusion that the automatic stay had terminated not later than ten days after the entry of the void dismissal order; In re De Jesus Saez, 721 F.2d 848 (1st Cir. 1983), and Olson v. Commissioner, 86 T.C. 1314 (1986), which was an unpublished opinion. Neither of these cases actually support the District

Court, as will be demonstrated.

In the Saez case (App. A-35, 36), a creditor foreclosed upon a debtor's home within ten days of the order dismissing the Chapter 13 petition. The debtor filed a motion to reconsider the dismissal, which the bankruptcy court granted, thereafter setting aside the foreclosure. The creditor appealed, and argued that the motion to reconsider had never been served. The district court affirmed, stating that it didn't matter that the motion had not been served; the foreclosure had violated the automatic ten-day stay of Rule 762 (the forerunner of 7062). The Court of Appeals reversed, ruling, inter alia, that Rule 762 only applied to adversary proceedings and contested matters, and the dismissal of the Chapter 13 petition was neither of these. (Saez was decided in 1983, prior to the amendments of 1984 which, through FRBP 1017(d), specifically made dismissals

contested matters).)

The Saez Court, however, decided the case primarily based on the issue of the bankruptcy court's jurisdiction. Because the motion to reconsider, although filed, had not been served, the Court of Appeals ruled that the bankruptcy court ceased to have jurisdiction over the case, and hearing the deficient motion could not restore the lower court's jurisdiction. Since the automatic stay had terminated with the dismissal, the foreclosure by the creditor had not violated the stay. Ass the Saez Court stated: "de Jesus's chapter 13 petition had been dismissed; its revival was dependent on the vitality of de Jesus's motion to reconsider." Saez, 721 F.2d at 854. (Emphasis added)

In the instant case, Petitioner's motion to reconsider was properly served, as was found by the BAP. (App. A-7) Therefore, under the holding of Saez, the motion did

act to "revive" the case, and the automatic stay, which was thus in effect at the time of the foreclosure sales.

As for the other case cited by the District Court, Olson v. Commissioner, 86 T.C. 1314 (1986), that case also fails to support the ruling by the District Court re the motion to reconsider having no effect on the dismissal. In Olson, the debtors argued that the automatic stay remain in effect following the dismissal of their case, until their appeal of the dismissal was denied. The tax court held that since the dismissal order had been affirmed on appeal, there had not been any stay in effect during the pendency of the appeal. In reaching that ruling, however, the Tax Court stated:

> "We do not have the question before us of whether the automatic stay remains in effect during the pendency of a motion for reconsideration of an order of dismissal or during the pendency of a motion for stay pending appeal."

Footnote 4, Olson, 86 T.C. 1314 (1986).

One other note of interest is the fact that the District Court relied on certain findings of fact and conclusions of law, prepared and submitted by counsel for the Respondents Rodriguez almost three months after Petitioner had appealed the default approval of the rescinded settlement. The document was simply a very belated and improper attempt by Respondents' counsel to provide some kind of support for the default approval order. Petitioner's motion to vacate the order was denied on June 15, with the appeal being filed on June 22, while the trumped-up findings and conclusions were signed and filed by Judge Russell on September 13, 1988. Although this fact was pointed out to the District Court, and Petitioner argued that since Judge Russell had no longer had the jurisdiction to sign and file the document, it could not be given any consideration on appeal, the

District Court relied on the document as the "record" for establishing the reasons that the lower court approved the settlement agreement. (App. A-47, 48)

In her argument that a case could be made for the theory that the automatic stay had never lapsed because the order dismissing the case was void, Petitioner cited the only Ninth Circuit case to have considered such an issue; In re Krueger, 88 B.R. 238 (9th Cir. BAP 1988). The District Court stated that Krueger case was not applicable because in Krueger the BAP Panel had held the dismissal order to be void for lack of notice, and in Petitioner's case, she had received notice, so that there was no violation of due process. (App. A-38 - 40)

The District Court missed the point of Petitioner's argument. In Krueger, the BAP Panel explained that an order

which is issued in a manner which violates due process rights, or fails to meet the statutory requirements, is void, and without legal effect. Krueger, 88 B.R. at 239. Since the order was void and without legal effect, the case had never been effectively dismissed, and the automatic stay had thus never terminated, making the creditor's foreclosure invalid for being in violation of the automatic stay.

In the instant case, the record clearly reveals that the BAP Panel also considered the order dismissing Petitioner's case to be void for having failed to meet statutory requirements, and therefore held that it "must be vacated." (App. A-8) The record also reveals that the BAP Panel considered the possibility that the foreclosure sales, if valid, would "moot" the appeal, and call for its dismissal. (App. A-4) The District Court was correct in one respect; if an appellate court cannot grant any

"effective relief" to the appellant, the appeal is moot, and must be dismissed. This principle is well-established in the Ninth Circuit, and a valid foreclosure is certain to moot the appeal. See In re Mann, 907 F.2d 925 (9th Cir. 1990). But in ignoring the prior BAP decision, which established that the dismissal order was void, and the foreclosure sales were not valid, the District Court ignored the "law of the case doctrine: and committed clear legal error in arriving at a different conclusion than did the BAP Panel. To hold otherwise is to hold that the District Court could overturn a prior decision of the BAP, (on the same point, and in the same case), which would mean that the District Court is a higher level in the appellate system than is the Ninth Circuit Bankruptcy Appellate Panel. Such a result would eliminate res judicata, collateral estoppel, and the doctrine of the "law of

the case" when it came to decisions by the BAP, which makes a mockery of the entire Bankruptcy judicial procedures.

One specific ruling that was made by the District Court, however, was considered by the Petitioner to be correct; i.e., that the ten-day stay of FRBP 7062 did apply to case dismissal orders. (App. A-68, 69) One question, however, still remains unsatisfactorily addressed. If a timely motion to reconsider a final order in a bankruptcy proceeding prevents an appeal from being filed until <u>after</u> the entry of the disposition of the motion, pursuant to FRBP 8002(b), and an appellant is given ten days thereafter in which to file the appeal, is the ten-day stay of FRBP 7062 therefore <u>extended</u> by the motion? The Petitioner has found no case law dealing with this question. As with the question of whether or not the automatic stay remains in effect during the pendency of a

motion to reconsider a dismissal order, or thereafter, a motion for stay pending appeal of the dismissal order, there seems to be no case law among the Circuits, and it also appears to be "a question of first impression."

III. THE COURT OF APPEALS DECISION TO AFFIRM BOTH PUBLISHED OPINIONS WAS IN ERROR AS A MATTER OF LAW

The above contentions were presented to the Court of Appeals for the Ninth Circuit by the Petitioner in the Cases 90-16501 and 91-15360. In both cases, the facts establishing that the District Court had specifically ruled that the ten-day stay of FRBP 7062 was applicable to case dismissal orders, thus directly contradicting the earlier bankruptcy court opinion, Weston v. Cibula, supra, were clearly placed before the Ninth Circuit Court of Appeals, both in the appellate briefs of the Petitioner, and the record provided to the Court.

Based upon the above facts, it is very puzzling that the Ninth Circuit Court of Appeals chose to affirm both of the above-referenced cases in its single-page decision of the two appeals, 90-16501 and 91-15360, and took over six months to do so. It is also very puzzling why the re-hearing petition was denied without any comment, when the Petitioner had pointed out the fact that the two decisions were in conflict, and, as a matter of law, they both could not be affirmed, especially with no independent discussion by the Circuit Panel regarding the conflict.

Perhaps the above facts were finally recognized by the Circuit Panel, albeit belatedly, as Petitioner's motion for stay pending certiorari was granted.

CONCLUSION

Without this Court's granting the petition for certiorari, certain events will occur. A clear message will go out

that the "plain meaning" rule of statutory interpretation is no longer espoused by this Court, and the former decisions of the Court which set out the clear directives of statutory interpretation, are to now be disregarded, thus allowing any judge to "rewrite" a statute to reflect what that judge feels it should have said.

The published opinion, Weston v. Cibula, 101 B.R. 202, supra, which did "rewrite" the Code, will have been affirmed by two appellate courts, and, by implication, the Supreme Court itself. Thus, the opinion will become an authoritive case, to be cited by other courts wishing to usurp the role of Congress and become "law-makers", rewriting the statutes to suit their ideas, rather than accepting what Congress has enacted and applying it.

This, in turn, will clutter the courts of appeal, and presumably this Court also, with cases involving questions of statutory

interpretation, and, to paraphrase Justice Scalia, the symbol of the judicial profession will not "remain the scales", but will become "the see-saw." Pattersonv. Shumate, __ U.S. __. 112 S.Ct. 2242, 2251 (1992), Justice Scalia concurring.

In addition, the important questions presented in the other case, Weston v. Rodriquez, 110 B.R. 452, supra, which were either not addressed by the District Court, or erroneously answered, will also remain to be faced another day. Which they will, as the case has set an erroneous precedent on certain questions of first impression among the Circuits, and that case, also, will have been affirmed by the Ninth Circuit Court of Appeals, and, by implication, the Supreme Court of the United States. It also will be accorded the status of an "authority", to be cited by other parties.

In order to prevent the above events from occurring, the petition foe certiorari

should be granted, thus once again acting to support the former decisions by this Court establishing the "plain meaning" rule of statutory interpretation,

Based upon the foregoing reasons cited above in this petition, Petitioner respectfully prays that this petition be granted, and a writ of certiorari be issued to review the decision of the Ninth Circuit Court of Appeals in the instant two cases.

Respectfully submitted on this 27th day of October, 1992.

JoAnne M. Weston,

Petitioner in pro per